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No. 87-570

In the Supreme Court of the United States

OCTOBER TERM, 1987

NICHOLAS COLAFELLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether State legislative committee records are immune from subpoena by a federal grand jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 821 F.2d 946. The opinion of the district court (Pet. App. 24a-41a) is reported at 626 F. Supp. 1319.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1987. A petition for rehearing was denied on July 6, 1987. On August 24, 1987, Justice Brennan extended the time for filing a petition for a writ of certiorari to October 4, 1987, and the petition was filed on October 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The chairman of a select committee of the Pennsylvania General Assembly refused to comply with a federal grand jury subpoena seeking certain records of the committee's investigation into alleged contract fraud. Relying on a

common law privilege for state legislators derived from the Speech or Debate Clause of the Federal Constitution, the district court granted petitioners' motion to quash the subpoena in all but a few particulars. The court of appeals reversed the district court's order and remanded the case for consideration of whether the documents subject to the subpoena contain confidential communications protected by a deliberative process privilege.

1. In 1985, a select committee of the House of Representatives of the General Assembly of the Commonwealth of Pennsylvania began an investigation into the procurement of granite for constructing additions to the state capitol complex. The committee reviewed numerous documents and interrogated witnesses in both open and closed sessions. The committee's investigators prepared transcripts, summaries, notes, and memoranda of interviews during the course of the investigation in attempting to determine whether improprieties, including alleged payoffs, had occurred. In 1986, the United States Attorney for the Middle District of Pennsylvania convened a grand jury to investigate the allegation of contract fraud. The committee's chairman and counsel met with FBI agents and discussed their investigation, but they denied the agents access to material the committee had not made public, and they refused to reveal the names of many of the witnesses or to describe their testimony. Pet. App. 3a-4a.

Following that meeting, the United States Attorney caused a grand jury subpoena duces tecum to be directed to the committee's chairman or records custodian demanding production of the documents received and compiled in the course of the committee's investigation. The chairman moved to quash the subpoena and, with the consent of the United States Attorney, several other state legislators were permitted to intervene. The parties stipulated that no state legislator was a target of the grand jury investigation. Pet. App. 4a-5a.

The district court granted the motion to quash (Pet. App. 24a-41a). It found the Speech or Debate Clause of the State Constitution[1] inapplicable because the admissibility of evidence in federal criminal cases is governed by federal, rather than state, law (*id.* at 27a-28a). The court concluded, however, that a common law legislative privilege, derived from the Speech or Debate Clause of the Federal Constitution[2] and cognizable under Fed. R. Evid. 501,[3] generally protected the committee's records from disclosure to a federal grand jury. While quashing the grand jury subpoena for the most part, the district court nonetheless permitted the grand jury to obtain from the committee the names of the witnesses who appeared before the committee and indicated that the subpoena could be used to obtain copies of any document or exhibit written by a witness who was not a member of the legislature if the committee had the only copy (*id.* at 40a).

2. The court of appeals reversed (Pet. App. 1a-23a). It found instructive this Court's decision in *United States* v. *Gillock*, 445 U.S. 360 (1980), where the Court held that no common law privilege barred the introduction into evidence in a criminal proceeding of legislative acts of a State senator (*id.* at 374), even though the federal Speech or Debate Clause would have barred the introduction into

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[1] The Pennsylvania Constitution, Art. 2, § 15, provides that "for any speech or debate in either House [Members of the General Assembly] shall not be questioned in any other place."

[2] The Federal Constitution, Art. I, § 6, Cl. 1, provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other place."

[3] Rule 501 provides, in pertinent part, that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

evidence of the legislative acts of a Member of Congress (*id.* at 366-367). The court of appeals observed that in *Gillock* this Court analyzed the purpose of the speech or debate privilege in terms of " '[t]wo interrelated rationales . . .: first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence' " (Pet. App. 13a (quoting 445 U.S. at 369)). Concerning the primary purpose, the court of appeals emphasized that it rests on a concern for the maintenance of separation of powers among the branches of the federal government, and that federalism principles do not raise the same concerns "because the Supremacy Clause sanctions 'interference' with state legislatures by the federal executive and judiciary so long as they pursue legitimate federal aims" (Pet. App. 17a). The court noted that, as a practical matter, state legislators could not be insulated from federal intrusion through the recognition of a qualified privilege, because that privilege would necessarily give way under *Gillock* whenever misconduct by a state legislator is alleged (*ibid.*).[4]

Concerning the second purpose of the Speech or Debate Clause, the court of appeals rejected petitioners' claims that a qualified privilege for state legislators must be recognized because the functioning of state legislatures

[4] The district court had distinguished *Gillock* by stating that "its holding was expressly confined to those situations in which a state legislator is charged with a federal crime or is the target of a federal criminal investigation" (Pet. App. 32a). The court of appeals stated: "[W]e do not believe the district court's efforts merely to distinguish *Gillock* paid proper respect to its significance. *Gillock*'s reasoning undercuts the weight we may accord interests of comity and federalism, and *Gillock*'s practical impact undermines the extent to which recognition of a speech or debate privilege for state legislators may realistically further the interests that the privilege has traditionally safeguarded" (*id.* at 16a).

could be impeded by onerous production requirements. The court agreed that an unduly burdensome subpoena could intrude on important state legislative interests, but it concluded that that concern was insufficient to justify the creation of a privilege because Fed. R. Crim. P. 17 authorizes the district courts to quash or modify a subpoena that is unreasonable or oppressive (Pet. App. 18a-19a). While finding state legislature's need for confidentiality "more troublesome" (*id.* at 19a), the court concluded that that need did not justify the creation of a privilege for the full range of activities normally protected by the federal Speech or Debate Clause. Instead, the court suggested, without deciding, that confidential communications could be protected adequately by a narrower privilege based on the widely recognized deliberative process privilege rather than the Speech or Debate Clause (*id.* at 22a). Accordingly, the court of appeals remanded the case to the district court for a determination of whether documents subject to the grand jury subpoena were protected by that narrower privilege (*id.* at 23a).

ARGUMENT

1. The court of appeals did not resolve the dispute in this case. Rather, it rejected the rationale employed by the district court, but then remanded the case for further proceedings to determine whether any or all of the subpoenaed materials are protected from disclosure under a privilege for confidential deliberative communications. Pet. App. 21a-23a. It is therefore unclear what materials, if any, petitioners will ultimately have to produce in response to the grand jury subpoena. More generally, the scope accorded to the deliberative communications privilege may well affect the character of the interests at stake in this and other speech or debate privilege cases. If a deliberative communications privilege is recognized, it may be held to cover the materials that petitioners regard

as most sensitive in this case, and that legislative committees in any future cases are likely to regard as needing special protection. Accordingly, this case is now in an interlocutory posture. The court of appeal's ruling at this juncture constitutes only an abstract treatment of legal principles. Until the district court applies those principles to the materials at issue in this case and rules that some or all of the subpoenaed materials must be produced, the case is not ripe for this Court's review.

2. Contrary to petitioners' contention (Pet. 6-11, 14-17), the court of appeals correctly concluded that state legislators are not entitled to assert a privilege based on the privilege enjoyed by Members of Congress under the federal Speech or Debate Clause.[5] In *Gillock* this Court concluded that the "separation of powers doctrine * * * [gives no support to the grant of a] privilege to state legislators in federal criminal prosecutions" and that "federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch" (445 U.S. at 370). While indicating that "principles of comity command careful consideration," the Court went on to find that "where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields" (eid. at 373).[6] Accord-

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[5] It is not even clear, contrary to petitioners' apparent assumption, that Members of Congress could invoke the Speech or Debate Clause to resist complying with the subpoena in this case, as the court of appeals noted (Pet. App. 12a n.4). As the court also concluded, however, it is not necessary to reach that issue here.

[6] This Court has found state legislators immune from civil liability in a number of cases. See, *e.g.*, *Supreme Court* v. *Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980) (immunity for state judges acting in legislative capacity from declatory and injunctive relief in civil action); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (immunity for regional legislator from damages in civil action); *Tenney* v. *Brandhove*,

ingly, since federal grand juries have a right to every man's evidence (*United States* v. *Dionisio*, 410 U.S. 1, 9-10 (1973)), and, under *Gillock*, federalism concerns are outweighed by the interest in enforcing federal criminal laws, there is no basis for a broad privilege such as that recognized by the district court.[7] In addition, the court of appeals correctly concluded (Pet. App. 17a) that recognition of a privilege barring disclosure of information relevant to federal criminal investigations would not in any event protect state legislatures from federal interference since, under *Gillock*, such a privilege would yield whenever federal investigators sought evidence of possible criminal activity by legislators.

Nor is there merit to petitioners' contentions, echoed by amici, that the decision below may "discourage legislatures from forming investigative committees, discourage

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341 U.S. 367 (1951) (immunity for state legislator from damages in civil action). However, this Court made clear in *Gillock* that the immunity recognized in those cases applies only in civil actions, stating that "*Tenney* was a civil action brought by a private plaintiff to vindicate private rights" and that "*Tenney* and subsequent cases on official immunity have drawn the line at civil actions" (445 U.S. at 372, 373). Similarly, in *Supreme Court* v. *Consumers Union of the United States, Inc.*, the Court distinguished *Gillock* by noting that "the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions" (446 U.S. at 733).

[7] Petitioners miss the mark in suggesting (Pet. 16 n.7) that it is relevant that proceedings involving failures to comply with grand jury subpoenas are civil in nature. What is relevant is not the nature of the proceeding but the nature of the federal interest, and here, as in *Gillock*, the federal interest is the enforcement of federal criminal law. Cf. *Gravel* v. *United States*, 408 U.S. 606, 627 (1972) (emphasis added) ("[W]e cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress *or to frustrate the grand jury's inquiry* * * *."), cited in *Gillock*, 445 U.S. at 373-374 n.12.

legislators from serving on these committees, and even discourage persons from serving as legislators if they may be summoned to appear before the grand jury at the whim of the United States Attorney" (Pet. 10). This contention exaggerates the potential burden of grand jury subpoenas on state legislative committees. All the grand jury seeks in this case is information that the committee has compiled that is relevant to a federal criminal investigation. There is no claim that the request here is burdensome, and there has been no request for testimony before the grand jury by any legislator. Moreover, as the court of appeals stated (Pet. App. 18a-19a), a district court may quash or modify a burdensome request under Rule 17, Fed. R. Crim. P. Furthermore, since the court of appeals suggested that the deliberative process privilege might protect confidential communications (Pet. App. 19a-23a), it is hard to see how its decision is likely to interfere significantly with the work of state legislatures.

3. There is no merit to petitioners' claim (Pet. 12-14) that the decision below conflicts with *Star Distributors, Ltd.* v. *Marino,* 613 F.2d 4 (2d Cir. 1980), and *In re Hampers,* 651 F.2d 19 (1st Cir. 1981). *Star Distributors* was a private civil action for injunctive relief against a State legislative committee. Applying this Court's decision in *Tenney* v. *Brandhove,* 341 U.S. 367 (1951), the court of appeals held that the private civil suit was barred by legislative immunity, even though it sought injunctive relief rather than damages. *Star Distributors* thus did not involve a federal criminal investigation. Moreover, *Star Distributors* was decided before *Gillock,* and to the extent that it suggests that the common law speech or debate privilege for state legislators should be as broad as the Speech or Debate Clause protection for federal legislators, *Gillock* compels a contrary conclusion with regard to federal criminal proceedings.

Hampers did not involve a state speech or debate privilege at all. Instead, it involved a federal grand jury subpoena to a state executive branch official to produce state tax records. The court of appeals held that the state tax returns were protected by a common law privilege under Rule 501. But the court based its decision primarily on the balance Congress struck in 26 U.S.C. 6103(i)(1), which governs the disclosure of federal tax return information. The court stated that "[b]eing charged as we are under Rule 501 to look to reason and experience in charting [the] federal evidentiary common law, we think the key has already been forged by the Congress in legislating in 26 U.S.C. § 6103(i)(1) the conditions under which federal tax information may be made available" (651 F.2d at 23). If state tax returns were not protected in the same manner as federal tax returns, the court explained, then Section 6103 could be circumvented (651 F.2d at 23), since much the same information is available from state tax returns as from federal tax returns. Thus, by its terms and its rationale, *Hampers* is limited to subpoenas for state tax returns, and it has no relevance here.[8]

4. The absence of any conflict among the circuits underscores another reason that review of the decision below is unwarranted. The issue raised in the petition simply does not arise with sufficient frequency to justify this Court's review. Petitioners have not cited a single other judicial decision involving a federal grand jury sub-

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[8] Moreover, the court in *Hampers* recognized only a qualified privilege for state tax records under Rule 501. The court explained that a federal grand jury subpoena for tax records could be enforced over the claim of privilege if the grand jury proffered (1) "reasonable cause to believe that a federal crime has been committed," (2) showed "that the information sought will be probative of a matter at issue in the prosecution of that crime," and (3) established "that the same information or equally probative information can not be obtained elsewhere through reasonable efforts" (651 F.2d at 23).

poena to a state legislative committee, and we are aware of none.[9] An issue that has arisen only once in the history of federal prosecution is not one that calls for the exercise of this Court's certiorari jurisdiction, particularly since even in this case the issue has not yet been finally resolved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Although ten briefs were filed by amici curiae, only the brief filed by the 75th Minnesota Senate described an instance where a federal grand jury subpoenaed state legislative materials. In that instance, the amicus states (Br. 4), the materials requested were produced without litigation, showing the "a United States Attorney, and state legislative committees can cooperate in investigating possible criminal activity without harming any of their respective functions." Thus, that one example hardly supports the claim that review by this Court is warranted.

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